No. 93-517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,
Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

On Writ of Certiorari to the New York Court of Appeals

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The extravagant and demeaning attacks made by the respondents and their *amici* upon the New York Legislature's creation of the Kiryas Joel Village School District rest on a highly disturbing premise. Our adversaries accept that local governmental authority may readily be delegated by a state legislature to a population that unanimously or overwhelmingly adheres to any one of many secular positions that sharply divide American society. No matter how totally and

ardently they may espouse their cause, advocates of gay rights, for example, or proponents of legalized narcotics or anti-abortion groups or advocates of gun control may operate a public school system. Our adversaries claim that because of the Establishment Clause religion is different.

The respondents and their *amici* have not, however, suggested that a geographic area populated overwhelmingly by Methodists, Baptists, Mormons, Episcopalians or Catholics is constitutionally disabled from providing local municipal services. [1] Indeed, it appears that even if a town's residents were overwhelmingly or entirely Jewish in their religious affiliation, few of the *amici* would raise an eyebrow over their right to elect a sheriff or vote for a school board. It is crystal-clear from the briefs of our adversaries, however, that this case is different only because the population of Kiryas Joel takes its religion *seriously*. Kiryas Joel's residents are not just Jews. They are Jews who believe that, in various respects, they are required by divine command to live as their Jewish ancestors did centuries ago. A citizenry that is as totally committed to its faith and religious observance as are the Satmar Hasidim cannot, our adversaries contend, be trusted to exercise the secular power of self-governance that may be enjoyed by other American citizens.

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1 Only the most strident of the *amicus* briefs — that of the National Coalition for Public Education and Religious Liberty ("National PEARL") and the National Education Association ("NEA") — quotes the "views of the minority" of the House Committee that considered, in 1889, whether to admit Utah to the Union (p. 10, n. 10). They urged that Utah be admitted only when "a sufficient number of non-Mormon citizens shall have located in that Territory." In fact, Utah was admitted to the Union six years later, without a large influx of non-Mormon citizens. The Bill of Rights has survived, and the secular government of the State of Utah has been administered by highly qualified Americans, even if many have been devout Mormons.

The theme that emerges from the briefs urging affirmance is that devout religious observance is a national menace. Our adversaries argue, in essence, that those to whom religion is the most important value in life are so far beyond what is acceptable in American society that secular governmental institutions cannot be left in their hands.

This is a remarkable assault on a community that is productive and law-abiding, and whose religion prescribes no more socially unacceptable conduct than occasional separation by gender. This Court was vigilant, just last Term, to bring under the protective umbrella of the First Amendment a religious sect of relatively recent origin that engages today in animal sacrifices. It is being asked in this case to impugn a religious group that has its roots in observances that are more than 3000 years old, and that seeks principally to be permitted to raise its children to honor values and centuries-old traditions that harm no person and no living creature. Rather than being a threat to American society — as the respondents and their *amici* view them — a devoutly religious group like the Satmar Hasidim is, we believe, a national treasure. The Free Exercise Clause of the First Amendment protects such a treasure from the oppressions of majoritarian conformity.

The respondents do not explicitly challenge the constitutionality of the existence of the Village of Kiryas Joel, but many of their *amici* are not as diffident. The rationale of most briefs arguing for affirmance would require the dismantling of the Village of Kiryas Joel, which has operated peacefully and satisfactorily since 1977 to provide secular local services for the population of the municipality. Those who seek to dismember the Village have not, however, proved their assertions that Kiryas Joel is a "religious establishment" or a "theocratic municipality" in a court of law, before a judge who ruled after an adversary presentation on legally

authenticated evidence. If one credits our adversaries, the danger presented by the existence of Kiryas Joel is so great that in this instance the Lewis Carroll rule of litigation must govern — "sentence first, verdict afterward." Indeed, if the respondents and their *amici* have their way, the process must be "verdict first, trial afterward — if ever."

I

FACTUAL ALLEGATIONS *DEHORS* THE RECORD ARE PATENTLY IMPROPER AND SHOULD BE STRICKEN

The respondents deliberately chose to forego the development of the factual record needed to make an "as applied" challenge to Chapter 748. Their tactical objective — to capitalize on the general public's misconception of the faith and practices of Satmar Hasidim — has been furthered by various *amici*, who have "lodged" with the Court copies of documents that purport to demonstrate that certain religious leaders in the Satmar Hasidic community control the administration of the Village.

The "lodgings" submitted by National PEARL and the NEA and the Committee for the Well-Being of Kiryas Joel are improper and should be returned by the Clerk. An *amicus*' extra-record facts should be confined to those that "resemble the type of facts presented in Brandeis briefs." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) at 564-65.

> If the presentation by the amicus is to be given weight by the court, the nonrecord facts relied upon should have the ring of truth on their face. They should not relate to the facts of the particular case as between the parties, but should resemble the "legislative facts" having "relevance to legal reasoning and the law making process" described by the Advisory Committee on the Federal Rules of Evidence in its treatment of the subject of judicial notice.

Stern, *Appellate Practice in the United States* (2d ed. 1989) at 307. The American Bar Association has deemed efforts by counsel to encourage a court to consider extra-record facts to be "unprofessional conduct." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) at 555 (citing *ABA Standards Relating to the Administration of Criminal Justice, Compilation 18*, 135-36 (1974)).

We ask the Court to direct the Clerk to return these "lodgings" to the respective *amici* and to strike the briefs of the *amici* who have engaged in this blatantly improper course [2] as a deterrent to counsel in other cases who might be tempted to emulate what these *amici* have done. In case the "lodgings" remain in the Court's record, we respond briefly to the principal allegations that the respondents and their *amici* are making.

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[2] Another remarkable foul blow by National PEARL and the NEA is their repeated reference to the Kiryas Joel public school as the "Sha'arei Hemlah" school, Hebrew words that mean "Gates of Compassion." Undersigned counsel represents, as an officer of the Court, that in more than four years of representing the Kiryas Joel Village School District, he has *never* heard that name applied to the public school, even when he spoke in Yiddish with members of the community.

A. Religious Control of Elections.

The most compelling evidence that religious authorities in Kiryas Joel are unable to compel conformity in the governance of the Village is the fact that an *amicus* brief was filed by a group calling itself "The Committee for the Well-Being of Kiryas Joel," which purports to represent "over 500 members of the Satmar Jewish community of Kiryas Joel" and "opposes the authority of Rabbis and unelected leaders." Moreover, the Committee's leader was a candidate for the Kiryas Joel Village School Board in its first election and received 673 votes — almost 40 percent of the total ballots cast and about two-thirds of the votes cast for the closest competitor who was elected (2 R. 487). Democracy and political choice are alive and well in the Village of Kiryas Joel.

The *amici* assert, however, that the seven elected candidates were endorsed by the Satmar Grand Rabbi. But it is as American as apple pie for religious leaders such as the Reverend Pat Robertson and the Reverend Jesse Jackson (to name only the most famous recent examples) to endorse candidates for public office. Do those endorsements constitutionally poison the entire electoral process? Must it be presumed as a matter of law — with no evidence whatever — that every Satmar Hasid will inexorably cast his vote as a religious obligation for the candidates approved by the Grand Rabbi? The experience of the so-called "dissident" candidate for the School Board proves the contrary.

The fact of the matter is that many American clergymen seek to affect the public's decision on secular issues. Some succeed, and others fail. The Satmar Grand Rabbi joins a distinguished roster in American history, and the success or failure of his effort does not determine the

constitutionality of the governmental structure for which the vote is taken.

B. Restrictions on Sales and Rentals.

National PEARL and the Committee for the Well-Being of Kiryas Joel assert that the religious authorities within Kiryas Joel have urged adherents to restrict sales or rentals to Satmar Hasidim and have asked building contractors to pay fees to the local Satmar congregation for every unit they construct. The documents they have unilaterally "lodged" do not prove whether those exhortations, if made, were accepted and acted upon. More fundamentally, however, statements and actions of private religious leaders have no bearing on the validity of governmental action. One challenged "proclamation" states that it is the result of a meeting "between the leadership of the Congregation and the leadership of the Yeshiva" (Lodging of National PEARL, Tabs 2, 4; Lodging of the Committee for the Well-Being of Kiryas Joel, Document 4, p. 1). Another is the result of a meeting "between the Grand Rabbi and the builders" with the "Leadership of the Congregation of Kiryas Joel" also present (Lodging of the Committee for the Well-Being of Kiryas Joel, Document 5, p. 1). On their face these are proposals by private religious leaders that may or may not be followed. They do not bear the imprimatur of the Village or the public school district.

Federal and state law prohibit racial or religious discrimination in the sale or rental of a home. 42 U.S.C. § 3604; N.Y. Exec. Law § 296(5)(a) (McKinney 1993). Regardless of the desires of clergymen in the Village, a non-Jew or a Jew who is not a Satmar Hasid may not be denied

the legal right to purchase or rent a home. To our knowledge, none has attempted to do so. [3]

II

PRACTICES THAT HAVE BEEN THE SUBJECTS OF OTHER LITIGATION ARE IRRELEVANT

The respondents persist in the tactic they have followed in the courts below — *i.e.*, utilizing the fact that Satmar Hasidim have litigated and lost in federal courts two cases involving education as proof that their religion is incompatible with the proper operation of a public school. Brief for Respondents, pp. 5-8, 37, 43. The two litigations are entirely irrelevant, and are described in the respondents' briefs only to suggest insidiously that the community is trying, in some manner, to obtain benefits to which it is not entitled.

A bona fide effort to arrange a workable "neutral site" for remedial instruction on the premises of a Brooklyn public school was invalidated in *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986), because the court determined that walling off part of the public school and *excluding* non-Satmar students from that portion of the public building was impermissible. In this case, no non-Satmar child

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[3] National PEARL and the NEA also assert that the building that houses various municipal offices has mezuzahs on its doors. If this representation is accurate and if the presence of the mezuzah violates the Establishment Clause, a lawsuit may be brought to remove it. *See, e.g., Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 3028 (1992) (challenge to inclusion of Christian cross in city insignia). No one suggested that the City of Austin was constitutionally invalid and had to be disbanded if its city insignia violated the Establishment Clause.

is excluded. Indeed, petitioner has clearly stated in each of the courts below that *any* child residing in Kiryas Joel who seeks the services of the public school, regardless of religious affiliation, is welcome to attend the Kiryas Joel public school.

Nor is the litigation concerning the gender of school bus drivers relevant here. In *Bollenbach v. Board of Education of the Monroe-Woodbury Central School District*, 659 F. Supp. 1450 (S.D.N.Y. 1987), a district court held that seniority provisions of a labor contract entitling female bus drivers to be assigned to the routes that served Satmar Hasidim overrode the request of the Hasidim to have male drivers assigned to busses carrying boys to school. Since separation by gender is not practiced in the public school at issue in this case because it serves disabled children, the *Bollenbach* decision is patently irrelevant.

III

NO RELIGIOUS INSTITUTION OWNS OR GOVERNS KIRYAS JOEL OR ITS PUBLIC SCHOOL

The respondents and many of their *amici* claim that the constitutionality of the Kiryas Joel public school is controlled by this Court's decision in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), because a religious entity allegedly has been given governmental authority. This argument totally misconceives the legal and practical structure of the Village and of its public school.

Homes in Kiryas Joel are privately owned. Unlike *Oregon v. Rajneeshpuram*, 598 F. Supp. 1208 (D. Or. 1984), in which an entire municipality was owned by a church, and *State v. Celmer*, 80 N.J. 405, 404 A.2d 1, *cert. denied*, 444

U.S. 951 (1979), where governmental powers over land owned by a religious organization were officially delegated to the Board of Trustees of that organization, no religious body has been granted any governmental power by Chapter 748.

American citizens who are devoutly religious are given the same rights by Chapter 748 that they would have if they were not religious. But that legislative decision is not a cession of governmental authority to the "governing bod[y] of [a] church[ ]," as was true in *Grendel's Den*, 459 U.S. at 117.

IV

LEGISLATIVE ACCOMMODATION TO A LIFESTYLE THAT FACILITATES RELIGIOUS OBSERVANCE IS CONSTITUTIONALLY PERMISSIBLE

Respondents and various *amici* belittle the legislative accommodation argument that we have made in the alternative (Brief for the Petitioner, pp. 40-43) on the ground that we also assert that educating disabled Satmar children in Monroe-Woodbury public school buildings would not violate any alleged "separatist" tenet of Satmar Hasidic observance. We see no inconsistency whatever between these two positions.

The undisputed fact that *some* Satmar parents did try unsuccessfully to have their disabled children educated at the Monroe-Woodbury public schools proves that there is no inflexible religious tenet requiring "separation." Chapter 748 was not, therefore, enacted to comply with religious law. Nonetheless, we have consistently said that in order to maintain Satmar traditions and permit the transmission of

religious doctrine to future generations, the Satmar community has chosen to live together in Kiryas Joel. Chapter 748 may be viewed as a means of facilitating the private religious observance of those who live in the Village. If so, there is no constitutional vice in such an accommodation.

Chapter 748 does, indeed, remove a burden that otherwise inhibits the observance of religion by Satmar Hasidim. The school district boundaries in place prior to Chapter 748 placed the Village of Kiryas Joel under the jurisdiction of a public school district that operated all its schools outside the Village and insisted that all public education take place on the premises of those schools. These governmentally imposed boundaries and policies burdened Satmar religious practices by forcing Satmar parents living in Kiryas Joel to choose between foregoing public education for their disabled children and altering or relaxing the unique religious observances that made it impossible for their children to benefit from the education offered by the public school district.

Improvement of a public road that is used to reach a church is not a violation of the Establishment Clause even if the governmental roadbuilders know that the road will be used primarily by churchgoers. By the same token, creation of a public school district congruent with existing municipal borders is not a violation of the Establishment Clause even if its consequence is to make it easier for religious observers to educate their children closer to home so that their religious traditions may be maintained.

V

CHAPTER 748 IS NOT A "RELIGIOUS GERRYMANDER"

Respondents allege that Chapter 748 was "enacted to create a school district which separates people along religious lines." Brief for Respondents, p. 20. Other *amici* call it a "religious gerrymander."

In fact, Chapter 748 defines the new school district solely by the boundaries of the Village of Kiryas Joel, a lawful municipality from which no one may be excluded.

To be sure, Governor Cuomo was aware that Kiryas Joel was a village "whose population are all members of the same religious sect" (J.A. 40-41). But nothing in the Governor's approval memorandum suggests that he approved Chapter 748 in order to segregate people by religion or to give a preference to a particular denomination. The focus of the legislation was always the dispute over the special education services offered to Kiryas Joel residents by Monroe-Woodbury and the effort to resolve that dispute by placing the children in an environment in which everyone agreed they could confidently learn and develop. The children's special vulnerabilities may have been linked to their religious practices, but by addressing those vulnerabilities, the State was not trying to segregate along religious lines or to grant religious preferences.

Moreover, the statement by Chapter 748's legislative sponsor that the "Hasidic Jewish community hold firmly to its religious tenets" (J.A. 19) and by another proponent that the law would "provid[e] a mechanism through which students will not have to sacrifice their religious traditions in order to

receive the services which are available to handicapped students throughout the State" (J.A. 39) do not establish religious gerrymandering. The legislators understood that the vulnerabilities of the children grew out of their religious upbringing and unique religious dress, diet and other practices. They sought to accommodate those practices so that Satmar Hasidim would not be forced to abandon or relax their observances in order to receive otherwise available public services. This was consistent with the finest traditions of the First Amendment.

CONCLUSION

For the foregoing reasons and those stated in our principal brief, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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